No. 14,809

IN THE

United States Court of Appeals

For the Ninth Circuit

MYRTLE HOLLMAN,
Appellant,

vs.

CATHERINE BRADY,
Appellee.

On Appeal from the District Court for the Territory of Alaska, Third Division.

APPELLANT'S REPLY BRIEF.

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The reply brief of appellant will be limited to a discussion of two points which, in the light of appellee's brief, require further consideration.

REPLY TO APPELLEE'S ARGUMENT ON POINT ONE.

Appellee, in an attempt to justify instruction No. 3, argues that the court had a right to disregard the common law on slander *per se,* applicable in the Territory of Alaska, and give an instruction on the subject conforming to that in effect in jurisdictions where the legislature has changed or modified the

common law. Appellant believes that a court may not, without benefit of legislative authority, adopt a new rule defining slander *per se* different than the general rule of the common law.

Were it possible to change the rules of the common law whenever the court was dissatisfied with the principles of that law, and without benefit of legislation, then the rules of the common law would be held for naught and new laws would spring from decree of court.

Appellee states on page 4 of her brief, "the plaintiff was charged with having been a prostitute which is a criminal offense in Alaska". This statement is simply not true. Prostitution, as such, at the time of the alleged slanderous utterance and at the time of this trial, was not a criminal offense in the Territory of Alaska. The Alaska Code (Alaska Compiled Laws, 1949) contains a chapter designated as "Chapter 9" (Sections 65-9-1 to 65-9-34) entitled "Crimes Against Morality and Decency". The provisions of this chapter do not make prostitution, as such, a criminal offense. In 1955 the Legislature amended this chapter (Chapter 104, Session Laws of Alaska, 1955) to make it unlawful within the Territory of Alaska to practice prostitution. The trial court could not, as stated by appellee, take judicial notice that prostitution was a crime in the Territory of Alaska.

Appellee, in any event, seems to have overlooked the accusation contained in the alleged slanderous utterance. This utteranc was to the effect that plaintiff was an *ex-whore* from *Butte, Montana.* There was

no charge that plaintiff had practiced prostitution in the Territory of Alaska, but only an utterance to the effect that plaintiff had once been a prostitute in Butte, Montana, and had worked there with a girl named June.

The jury in the subject case was led to believe, by reason of this erroneous instruction, that the utterance or publication of a false statement imputing unchastity *or the commission of a crime such as prostitution* is defamatory and slanderous in itself.

With this instruction as a guide, the jury, if it believed that defendant had spoken the words, could only find for the plaintiff.

The instruction is not a correct statement of the law of slander under the common law, and prostitution, as such, was not a crime in Alaska, and there was no evidence before the court that prostitution was a crime in Butte, Montana.

REPLY TO APPELLEE'S ARGUMENT ON POINT TWO.

In this case the slanderous utterance was made to the husband. He went home and reported the utterance to appellee. She denied to him that she had ever been a prostitute in Butte, Montana, or anywhere else.

Here was a situation where the husband and wife held in their hands the key to injury and damage. Thus, where the husband had sole power to inflict

injury and damage, the possibilities of aggravation were unlimited. The husband could have heaped abuse, mental and physical, upon appellee every minute of the day, if he chose to do so. He abused her only when he got drunk. By his abuse, when drunk, as claimed, she lost weight and had a heart attack. Were the court to give its sanction to injury inflicted by such methods, it would result in temptations to manufacture injury and increase damages, controlled only by the husband's and wife's self-restraint.

Appellee sued for $50,000.00. She showed damages resulting only from her husband's abuse. The injury, if any, and the extent thereof, depending entirely on the husband and wife, could be completely self-serving.

For the foregoing reasons instruction No. 6 was erroneous and the jury was not given a proper instruction on this point, to the defendant's prejudice.

REPLY TO APPELLEE'S ARGUMENT ON POINT SEVEN.

Appellee stated in her brief on page 11, under Point Seven, that appellant had made no objection to dividing the panel of jurors and thus had waived the error, if any.

The supplemental transcript of record, designated after appellee had filed her brief, will show that objection was made to dividing the jury.

CONCLUSION.

In conclusion, for the reasons shown, the judgment of the trial court should be reversed.

Dated, Anchorage, Alaska,
April 10, 1956.

Respectfully submitted,
HAROLD J. BUTCHER,
Attorney for Appellant.